Farm Fresh, Inc., t/a Nicks' *and* United Food and Commercial Workers International Union, Local 400, AFL–CIO

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Farm Fresh, Inc., t/a Food Carnival *and* United Food and Commercial Workers International Union, Local 400, AFL–CIO. Cases 5–CA–21155, 5–CA–21311, 5–CA–21366, 5–CA–21368, 5–CA–21369, 5–CA–21408, 5–CA–21410, 5–CA–21412, 5–CA–21461, 5–CA–21462, 5–CA–21463, 5–CA–21511, 5–CA–21532, and 5–CA–21586

December 15, 2000

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, AND HURTGEN

On August 27, 1998, the National Labor Relations Board issued its Decision and Order in this proceeding.[1] The Board found that the Respondent committed several unfair labor practices, but dismissed allegations that the Respondent violated Section 8(a)(1) of the Act by ejecting two nonemployee union organizers from the snack bar of one of its stores and by excluding nonemployee union organizers from the sidewalks in front of four other stores.

Subsequently, United Food and Commercial Workers International Union Local 400, AFL–CIO (the Union) filed a petition for review of the Board's Decision dismissing the foregoing allegation with the United States Court of Appeals for the District of Columbia Circuit. In an opinion dated August 22, 2000, the court granted the Union's petition and reversed and remanded the case to the Board for further proceedings consistent with its opinion. *Food & Commercial Workers Local 400 v. NLRB*, 222 F.3d 1030 (D.C. Cir. 2000).[2]

By letter dated November 1, 2000, the Board notified the parties that it had decided to accept the court's remand and invited the parties to submit statements of position. The General Counsel, the Union, and the Respondent filed statements of position.

We have considered the Board's original decision in light of the court's opinion and the parties' statements of position. For the reasons that follow, we reaffirm on modified grounds the Board's prior dismissal of the allegation that the Respondent violated 8(a)(1) by ejecting the two organizers from the snack bar. However, we reverse the Board's prior decision and find that the Respondent violated Section 8(a)(1) by excluding nonemployee organizers from the sidewalks at four stores.

1. The first issue on remand centers on the efforts by union organizers, Dudley Saunders and James Green, to organize employees who worked at the Respondent's grocery store on Princess Anne Road in Virginia Beach, Virginia. Green and Saunders visited the store on May 1, 1990.[3] While standing on the sidewalk approximately 30 feet from the store entrance, they solicited employee support for the Union. Acting on a company rule prohibiting all solicitations within 50 feet of store entrances, and after seeing the organizers solicit an employee who was on duty, Store Manager Nat Harlow, ordered Green and Saunders to move 50 feet away from the store entrance. When they refused, Harlow obtained trespass warrants against Green and Saunders and the Union was requested by letter to advise them that they would be "considered trespassers and treated as such" if they returned to the store.

Disregarding this directive, Green and Saunders returned to the store on May 14 and ordered lunch from the snack bar. Harlow ordered them out and told them not to return until the pending trespass warrants were resolved.

In its original Decision, the Board Members unanimously agreed that the Respondent's action was not unlawful, but they differed as to the basis for that finding. A three-member majority (Members Hurtgen and Brame, with Chairman Gould concurring) found that the Respondent had again relied on the 50-foot no-solicitation rule when evicting the two organizers from the snack bar. *Nicks'*, 326 NLRB at 999. The majority acknowledged that Board precedent at the time of the organizers' removal from the public snack bar "held that solicitation in restaurants cannot be prohibited when . . . the conduct of the nonemployee organizer is consistent with the conduct of other patrons of the restaurant," *Montgomery Ward & Co.*, 288 NLRB 126 (1988). However, the majority overruled that precedent on grounds that it had already "effectively been overruled" by *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). 326 NLRB at 999. The Supreme Court held in *Lechmere* that absent a showing that the union has no other reasonable means of communicating its organizational message to employees, an employer generally has the right to exclude nonemployee organizers from its property. 502 U.S. at 534. Applying *Lechmere*, the Board majority found no evidence either that the Union had no other reasonable means of communicating its message or that the Respon-

[1] 326 NLRB 997.

[2] The court granted the Board's unopposed cross-petition for enforcement of Order provisions based on findings that the Respondent had violated Sec. 8(a)(1) in other respects.

[3] All dates are in 1990.

dent had discriminatorily applied its no-solicitation rule against the two organizers in its snack bar. The majority therefore dismissed the 8(a)(1) snack bar complaint. 326 NLRB at 1000.

In a separate concurring opinion,[4] Members Fox and Liebman disagreed with the majority's factual premise that the Respondent had relied on its no-solicitation policy when it ejected the organizers from the cafeteria. In their view, not only did the Respondent not rely on any no-solicitation rule, it had in fact admitted that it generally permitted union organizers to solicit in the snack bars of its stores. They therefore found *Montgomery Ward* inapplicable to the actual issue presented, and they dissented from the majority's decision to "reach out to reconsider and overrule" that precedent in circumstances that did not require any such analysis. 326 at 1006.

Members Fox and Liebman agreed to dismiss the complaint, however, on a different ground. They found that the Respondent had relied solely on the outstanding trespass warrants outstanding against the two particular union organizers when it ejected them from the snack bar. Applying *Lechmere* in this factual context, they found no evidence that this action involved discrimination against union solicitation. As stated, the Respondent had generally permitted union solicitation in the snack bar and there was also "no evidence to suggest that had the Respondent's managers had a similar confrontation with persons soliciting for another organization outside one of its stores, the Respondent would not have banned them from its property as well." Id.

Upon review by the D.C. Circuit, the court reversed the Board majority opinion. In express agreement with concurring Members Fox and Liebman, the court found "no evidence at all" that the organizers were ejected from the snack bar pursuant to the Respondent's no-solicitation rule. "Rather, all of the evidence . . . indicates that Green and Saunders were excluded simply because of the outstanding trespass warrants." *Food & Commercial Workers Local 400 v. NLRB*, 222 F.3d at 1033. Accordingly, the court concluded that the Board's "ultimate disposition cannot stand" because its factual underpinning was unsupported and, therefore, there was "no occasion to consider whether the Board's legal conclusion [that *Lechmere* effectively overruled *Montgomery Ward*] . . . is correct." Id. at 1034. In reversing and remanding the case to the Board for further consideration, the court also found no reason to consider whether the "actual ground upon which Farm Fresh ejected the organizers—the existence of the outstanding trespass warrants—would have sufficed to support dismissal of the unfair labor practice charge." Id.

Having accepted the court's remand, we must observe the court's opinion as the law of the case. In light of the court's finding that the Respondent did not rely on its no-solicitation policy when it expelled the union organizers from the snack bar, we must conclude, in agreement with the opinion previously stated by Members Fox and Liebman, that the legal issue whether *Lechmere* effectively overruled *Montgomery Ward* is not presented here. We shall therefore vacate that part of the original Board decision that addresses this issue.

As indicated above, the court left open to us on remand to decide the real question in this case—whether the Respondent was entitled to eject Green and Saunders from its premises based solely on the trespass warrants pending against them. With respect to this question, we adopt and rely on the analysis previously set forth in the concurring opinion of Members Fox and Liebman. In sum, there is no evidence of discrimination against union solicitation in the Respondent's ouster of two particular union organizers because of their outstanding trespass warrants. We therefore reaffirm on this basis the Board's conclusion that the Respondent did not violate 8(a)(1).

2. The second issue for Board consideration on remand concerns various actions taken by the Respondent to prevent nonemployee union organizers from soliciting on sidewalks within 50 feet of the entrances to four of its leased store properties.[5] The General Counsel contends that these exclusionary actions violated Section 8(a)(1) of the Act.

In its original decision, the Board adhered to the principle that "in cases in which the exercise of Section 7 rights by nonemployee union representatives is assertedly in conflict with a respondent's private property rights, there is a threshold burden on the respondent to establish that it had, at the time it expelled the union representatives, an interest which *entitled* it to exclude individuals from the property." *Indio Grocery Outlet*, 323 NLRB 1138, 1141 (1997), and cases cited there. To determine whether a respondent has a sufficient property interest, the Board looks to the law of the state that created and defined that interest. Id. Applying this analysis, the Board found that language in the maintenance provisions of the Respondent's leases for each of the four stores in dispute created a sufficient property interest under Virginia law to permit exclusion of the nonemployee organizers from sidewalk areas. The Board there-

[4] 326 NLRB at 1004–1008.

[5] These stores were located on Shore Drive (Virginia Beach), Victory Boulevard (Portsmouth), Colonial Avenue (Norfolk), and Merrimack Trail (Williamsburg).

fore dismissed the 8(a)(1) allegations relating to the Respondent's exclusionary actions at these stores.

On review, the court applied the same *Indio* test but it found that the Board had misinterpreted Virginia law in finding that the maintenance provisions in the Respondent's four store leases gave it the right to exclude the organizers. Once again, having accepted the court's remand, we must apply the court's opinion as the law of the case. With respect to three of the Respondent's stores (Shore Drive, Colonial Avenue, and Merrimack Trail), the lease maintenance provisions were the only possible basis for finding that the Respondent had proved a sufficient exclusionary property right. The court, having determined that these provisions did not create such a right, we shall reverse our prior decision, find that the Respondent's exclusionary actions against nonemployee organizers at these three stores violated 8(a)(1) as alleged in the complaint, and order the Respondent to cease and desist from such unlawful conduct.

With respect to the store at Victory Boulevard, the court noted that, apart from the maintenance provision found insufficient to prove an exclusionary property interest, the lease at Victory Boulevard "appears to grant *Farm Fresh* the lease to the sidewalk itself." The court stated that the Board "may, of course, consider this point on remand." 222 F.3d at 1038.

The Respondent's statement of position on remand concedes, as it must, that the court's interpretation of Virginia law is final and binding. It further states that "there is no legal issue before the Board on remand dealing with the exclusion of nonemployee organizers from storefront areas." The Respondent notes that it has closed three of the four stores involved, including the store at Victory Boulevard.

In light of the Respondent's statement, it appears that the Respondent does not seek to litigate the point left open by the court's remand with respect to its property interest at the Victory Boulevard store. Moreover, the underlying administrative law judge's decision in this case addressed this point and found that the Respondent still did not meet its initial burden of proof because it failed to resolve ambiguous language in lease provisions indicating that the Respondent's property interest in that store's sidewalk could be either exclusive or nonexclusive.[6] We affirm the judge's finding in this regard.[7] Accordingly, the Respondent having failed to prove that it possessed a sufficient exclusionary interest in the sidewalk at the Victory Boulevard store, we conclude that it also violated 8(a)(1) at this location by directing nonemployee organizers to move off the sidewalk and by threatening them with arrest.

ORDER

The National Labor Relations Board orders that the Respondent, Farm Fresh, Inc.; Farm Fresh, Inc. t/a Nicks', and Farm Fresh Inc. t/a Food Carnival, Norfolk, Virginia Beach, Hampton, Portsmouth, and Williamsburg, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and threatening to enforce by arrest or otherwise any ban upon organizational activity by nonemployees in areas that it does not own or possess a sufficient property interest to exclude.

(b) Interfering with peaceful organizational activity waged by nonemployees within 50 feet of the entrances to its leased property on Victory Boulevard (Portsmouth), Colonial Avenue (Norfolk), Shore Drive (Virginia Beach), and Merrimack Trail (Williamsburg).

(c) Threatening union representatives with arrest because they were engaged in organizational activity in public areas in which the Respondent held no property interest at its stores on Shore Drive (Virginia Beach), Victory Boulevard (Portsmouth), Merrimack Trail (Williamsburg), and Colonial Avenue (Norfolk).

(d) Calling police to enforce removal of nonemployees engaged in organizational activity in public areas in which it held an insufficient property interest at its store on Shore Drive (Virginia Beach).

(e) In any like or related manner interfering with, coercing, or restraining employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facilities at Shore Drive (Virginia Beach), Victory Boulevard (Portsmouth), Merrimack Trail (Williamsburg), and Colonial Avenue (Norfolk), copies of the attached notice marked "Appendix."[8] Copies of the notice,

[6] 326 NLRB at 1014, comparing par. 1 of the lease that arguably includes the sidewalk as part of the demised premises, with par. 16 defining the sidewalk as "common area" in which the Respondent possesses merely a right of nonexclusive use.

[7] Member Hurtgen does not fully endorse the analysis on which his colleagues rely. As set forth in the underlying decision, he would require that an employer need only meet an initial burden of going forward as to the property right issue, i.e., to show prima facie that it possessed the property right to exclude. 326 NLRB at 1002 fn. 26. At that point, the burden would shift to the General Counsel to show that the property right did not exist. However, the Respondent appears to have abandoned its interest in litigating this issue with respect to each of the stores, including the Victory Boulevard stores. Accordingly, he finds it unnecessary to resolve this issue.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at those locations at any time since May 3, 1990.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the Board's original decision is vacated to the extent that it discusses and overrules *Montgomery Ward*, 288 NLRB 126 (1988).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate or threaten to enforce, by arrest or otherwise, any ban upon organizational activity by nonemployees in areas that we do not own or where we do not possess a sufficient property interest to exclude.

WE WILL NOT interfere with peaceful organizational activity waged by nonemployees in areas that we do not own or where we do not possess a sufficient property interest to exclude.

WE WILL NOT threaten union representatives with arrest because they were engaged in union organizational activity in areas that we do not own or possess a sufficient property interest to exclude.

WE WILL NOT call police to enforce removal of nonemployees engaged in union organizational activity in areas that we do not own or possess a sufficient property interest to exclude.

WE WILL NOT in any like or related manner interfere with, coerce, or restrain our employees in the exercise of the rights set forth at the top of this notice.

FARM FRESH, INC.; FARM FRESH, INC. T/A NICKS'; FARM FRESH, INC. T/A FOOD CARNIVAL